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**JUL 12 1994**

FEDERAL COMMUNICATIONS COMMISSION  
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July 12, 1994

**VIA HAND DELIVERY**

Mr. William F. Caton  
Secretary  
Federal Communications Commission  
Room 222  
1919 M Street, N.W.  
Washington, D.C. 20554

Re: Formal Comments in Video Dialtone Rulemaking, No. 8491

Dear Mr. Caton:

Pursuant to 47 C.F.R. § 1.419, the Local Community Coalition, through undersigned counsel, submits this original and nine copies of formal comments in the above-captioned proceeding.

Very truly yours,

MILLER, CANFIELD, PADDOCK AND STONE

By

  
Matthew C. Ames

Enclosure

cc: Ms. Peggy Reitzel  
ITS, Inc.

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JUL 12 1994

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF SECRETARY

In the Matter of )  
)  
PETITION FOR RULEMAKING TO ADAPT )  
THE SECTION 214 PROCESS TO THE )  
CONSTRUCTION OF VIDEO DIALTONE )  
FACILITIES )  
)  
PETITION FOR RELIEF FROM UNJUST )  
AND UNREASONABLE DISCRIMINATION )  
IN THE DEPLOYMENT OF VIDEO )  
DIALTONE FACILITIES )

Rulemaking No. 8491

To: The Commission

COMMENTS OF THE ALLIANCE FOR COMMUNICATIONS DEMOCRACY;  
THE ALLIANCE FOR COMMUNITY MEDIA; THE CITY OF  
CHILLICOTHE, OHIO; THE CITY OF DETROIT, MICHIGAN; THE  
CITY OF FORT WORTH, TEXAS; KING COUNTY, WASHINGTON; THE  
OFFICE OF THE CITY ATTORNEY OF THE CITY OF LOS ANGELES,  
CALIFORNIA; MONTGOMERY COUNTY, MARYLAND; THE CITY OF  
REDONDO BEACH, CALIFORNIA; AND THE CITY OF WADSWORTH,  
OHIO (COLLECTIVELY, THE "LOCAL COMMUNITY COALITION")

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July 12, 1994

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## SUMMARY

The issues raised by the Petitions that led to the Commission's request for comments illustrate the accuracy of the Local Community Coalition's comments in the original video dialtone rulemaking. The Section 214 process the Commission has adopted to govern video dialtone applications does not adequately consider the public interest. Thus, it is no surprise that video dialtone applicants are submitting plans that "redline" their service areas based on race and income.

Video dialtone will not provide substantial public benefits unless video dialtone systems are subject to regulations responsive to the needs of the local community served by the system. The Cable Act defines the type of regulation appropriate for multi-channel video distribution by wire ("television by wire"). These principles are also applicable to video dialtone insofar as video dialtone would deliver, among other things, television by wire. The central aspects of that regulation include access for noncommercial programming and universal service. The Petitions illustrate that in the absence of such regulation, certain groups are already being left out, denied the ability to speak or to listen over the new networks.

The proper venue for regulation to implement communications democracy is the locality where a television by wire system is installed and operates. Local governments are better placed than are federal or state regulators to determine local needs and conditions. Moreover, television by wire implicates numerous

issues with which local governments are necessarily concerned, including issues related to the safe and productive use of public rights-of-way. Local regulation is also essential if video dialtone is to see the kind of wide-ranging experimentation the Commission seeks. The explosive growth of the cable industry since the passage of the Cable Act demonstrates that local regulation by franchising is compatible with a prosperous market for television by wire.

The Section 214 process alone will not produce a system matching the Commission's vision for video dialtone. The proposal does not require universal service or any other public interest commitment on the part of operators. Only local franchising will meet the Commission's goals and the public interest.

Before the  
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Washington, D.C. 20554

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DIALTONE FACILITIES	)	

**COMMENTS**

To: The Commission

The Alliance for Communications Democracy; the Alliance for Community Media; the City of Chillicothe, Ohio; the City of Detroit, Michigan; the City of Fort Worth, Texas; King County, Washington; the Office of the City Attorney of the City of Los Angeles, California; Montgomery County, Maryland; the City of Redondo Beach, California; and the City of Wadsworth, Ohio (collectively, the "Local Community Coalition"), by their attorneys, hereby file the following comments in response to the Public Notice in the above-captioned proceeding, released June 13, 1994.

I. INTRODUCTION

The Commission issued the Public Notice to solicit comments from interested parties regarding the issues raised in a Petition for Relief and a Petition for Rulemaking filed on May 23, 1994,

by the Center for Media Education, the Consumer Federation of America, the Office of Communication of the United Church of Christ, the National Association for the Advancement of Colored People, and the National Council of La Raza (jointly, the "Petitions"). The Petitions assert that Section 214 applications to construct video dialtone facilities under the Commission's decision in Telephone Company-Cable Television Cross-Ownership Rules, Sections 63.54-63.58, Second Report and Order, 7 FCC Rcd 5781 (1992)<sup>1</sup>, have disclosed a pattern of economic and racial "redlining" that the Commission must correct.

The Local Community Coalition agrees with the concerns raised in the Petitions. The Section 214 certification process does not require video dialtone applicants to demonstrate that they will consider vital public interest issues such as the fair deployment of video dialtone within a given service area. Requiring a generalized showing that an applicant will "serve the public interest, convenience, and necessity" is not enough, because the Commission has yet to provide any standards for making that determination in the video dialtone context. As a result, the Section 214 video dialtone process to date has largely involved only debates about whether the proposal meets the Commission's definition of video dialtone and about cost

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<sup>1</sup>This decision, the Notice of Inquiry, 2 FCC Rcd 5092 (1987), the Further Notice of Inquiry and Notice of Proposed Rulemaking, 3 FCC Rcd 5849 (1988), the Further Notice of Proposed First Report and Order and Second Further Notice of Inquiry ("FNPRM") 7 FCC Rcd 300 (1991), and the corresponding comments of interested parties will be referred to as the "Video Dialtone Rulemaking."

allocation issues. What has been missing is any requirement that a video dialtone system serves the public interest, as opposed to the purely private commercial interests of the video dialtone provider.

The Petitions would resolve this question by forbidding redlining and encouraging more public participation in the application process. The Coalition agrees with these goals. Indeed, the Coalition has already proposed a regulatory scheme that would have avoided the need for the present proceeding. In its comments in the Video Dialtone Rulemaking,<sup>2</sup> the Coalition urged the Commission to preserve the traditional role of local franchising. In that proceeding, the Coalition argued that the Cable Communications Policy Act of 1984, as amended by the Cable Television Consumer Protection and Competition Act of 1992 (jointly, the "Cable Act"), governs all forms of multi-channel video distribution by wire, including video dialtone, and that application of the Cable Act would promote access for noncommercial programming, universal service, and safeguards against monopolistic and anticompetitive actions.

The present proceeding underlines the necessity for adopting an approach like that urged in the Coalition's 1992 comments. The Section 214 process does not adequately advance the Commission's own goals for video dialtone, nor does it adequately protect the public interest. Local franchising authorities, on

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<sup>2</sup>Telephone Company - Cable Television Cross-Ownership Rules, Sections 63.54-63.58, CC Docket No. 87-266, filed Feb. 3, 1992.



the other hand, have extensive experience with such issues as redlining. If allowed to regulate video dialtone systems, local governments will be able to ensure that all of their residents are treated fairly, and that local needs and interests are met.

II. THE USE OF PUBLIC PROPERTY TO PROVIDE TELEVISION BY WIRE IMPOSES CORRESPONDING PUBLIC INTEREST OBLIGATIONS ON THE PROVIDER

A. The Use of Public Property and Resources for Private Gain Subjects the User to Appropriate Regulation.

The Commission acknowledged in the Video Dialtone Rulemaking that any discussion of appropriate regulatory policy for video dialtone must begin with the public interest.<sup>3</sup> The Coalition argued at the time that the public interest is deeply involved in both the risks and benefits of video dialtone, and asked the Commission to take steps to protect consumers and nurture a true communications democracy. Unfortunately, the Commission chose to require nothing more of video dialtone operators than a Section 214 certificate. That the issue of discrimination by video dialtone providers has arisen so early in the development of video dialtone merely highlights the weakness of the Section 214 certification process.

Telephone exchange companies and cable television operators share a remarkable and valuable public privilege. They both enjoy use of the public rights-of-way in a manner that gives them unique profit-making opportunities and enormous economic

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<sup>3</sup>FNPRM ¶¶ 1-2, 12-17.

advantages over competing delivery technologies. In return, the public has the right to receive fair value for the use of that public property and to ensure that this public property retains its public character.

The public generally captures that fair value and protects the public interest through regulation: local government regulation of cable companies and state regulation of telephone companies. These officials are responsible for managing the limited resources of public rights-of-way in much the same way the Commission manages the limited resource of the broadcast spectrum. Compensation for the use of the right-of-way is usually provided in several forms. Monetary compensation is often provided in the form of franchise fees or utility taxes. In addition, nonmonetary compensation is provided in the form of such public benefits as universal service (which itself precludes redlining), access for local programming and information, and consumer rate regulation. Hence telephone companies, along with cable systems and electric and other utilities, are generally franchised for the specific services they provide, with the terms and conditions of the franchise helping to define the public benefits the private company owes to the local government for the use of the public's resources. Local regulation, in combination with state and federal administrative rules, thus serves to recapture public benefits that would otherwise be lost altogether if there were no such regulation. By contrast, the FCC's Section 214 procedure assumes that technology alone will deliver public

benefits, even though it fails to require (a) installation of high-capacity, two-way switched systems (under the FCC's current rules, a VDT operator can install a traditional coaxial, non-switched, one-way system technologically equivalent to a cable system); (b) any assurance that service would be affordable and available to the community at large as program purchasers or program providers; and (c) any process that would prevent the taking of public property for private purposes, without appropriate compensation.

B. The Cable Act Defines the Regulation Appropriate for Television by Wire.

Appropriate regulation depends on the local community interests affected and on the character of the service. Accordingly, every communications carrier using public rights-of-way should be required to provide important benefits to counter the risks that the carrier's activities pose both to the broader economy (such as anticompetitive behavior and unfair prices) and to the core First Amendment interests of the community (diversity of speech opportunities versus restraints on hearing other points of view). Austin v. Michigan Chamber of Commerce, 110 S. Ct. 1391 (1990). Thus, the law has always recognized that transmission of television signals using inherently limited resources, whether those resources are represented by the radio frequency spectrum or by the public rights-of-way, subject the carrier to certain public service requirements.<sup>4</sup> In this way,

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<sup>4</sup>Turner Broadcasting System, Inc. v. F.C.C., \_\_\_ U.S. \_\_\_, No. 93-44, slip op. (1994).

the carrier in part acts as a trustee for the public interest in using those resources, or a surrogate for the public, so that the benefits of using the resources may become available to the public at large.

Local telephone common carriers, for example, normally obtain a state certificate of public convenience and necessity. In many states, they also must obtain a local franchise. These instruments establish public service obligations, such as universal service, standards for customer service and quality of transmission, and franchise fees. They also place restraints on the carrier's monopoly power appropriate to the service for which the carrier is licensed, such as regulation of prices and terms of service. Broadcasters and cable operators also have public trustee obligations, such as political access rules. In some respects, the regulation of providers may be similar (for example, both telephone companies and cable companies may be required to pay franchise fees). In other respects, the regulations vary, depending on the nature of the market, character of the medium and the nature of the services provided.

The appropriate terms of service for private companies using public rights-of-way to provide "transmission of video programming directly to subscribers" by wire, are defined in the Cable Act. The Cable Act reflects the consensus among Congress, the Commission, telephone companies, cable operators, and broadcasters that television by wire requires a regulatory regime

different from the rules appropriate for voice and data common carriage on one hand, and over-the-air broadcasting on the other.

The regulation prescribed by the Cable Act promotes benefits that cannot be captured through marketplace pricing alone. Insofar as video dialtone service will include, among other things, television by wire -- what we now think of as cable service -- the video dialtone provider, like the conventional cable operator, must be held responsible for the public service obligations associated with that service. Unfortunately, the Commission's current regulatory structure for video dialtone service does not meet this fundamental public interest test, as illustrated by the filing of the Petitions and the discussion below.

### III. VIDEO DIALTONE WILL NOT OFFER SUBSTANTIAL PUBLIC BENEFIT UNLESS VIDEO DIALTONE SYSTEMS ARE RESPONSIVE TO LOCAL COMMUNITY NEEDS

#### A. The Public Interest Requires "Communications Democracy" Conditions for Video Dialtone.

The Video Dialtone Rulemaking suggested several advantages for video dialtone service, including the promotion of diversity, competition and infrastructure development, but only in the most general terms. In contrast, the regulatory conditions required for television by wire in the Cable Act provide a far more concrete and specific realization of these rather general goals, which may collectively be referred to as "communications democracy." Two aspects are of particular interest in light of the issues raised in the Petitions: access for noncommercial

programming and universal service. There can be no communications democracy if only the wealthy have access to the system.

1. Access for Noncommercial Programming.

If the ordinary citizen is to enjoy all the anticipated benefits of video dialtone, she must be able to originate and "broadcast" over the system. It must be possible for information to flow in both directions: the video consumer must also be an originator. The prospect of this two-way connection is part of the appeal of a video dialtone model. It reflects First Amendment values, since such a service, if realized, would augment the ability of independent citizens to communicate with each other. It also serves the value of diversity, since it permits ordinary citizens, not merely well-financed speakers, to be heard. For similar reasons, efficient interconnection of voice service has long been a goal of United States communications policy. A regulatory model that allows economic and racial discrimination, however, will preclude these goals from ever being met.

The Petitions illustrate that, in the absence of regulation, certain groups are already being left out. As the Coalition argued in its comments on the Video Dialtone Rulemaking, it appears that video dialtone systems and services are being designed and priced to meet the needs of well-financed producers, rather than the needs of individuals or nonprofit groups.

Most individuals and groups require special assistance to make effective use of television. Few individual citizens will ever have the funds, equipment or technical expertise to produce the video analogue of the broadsides that helped inspire the American Revolution. If video dialtone networks are truly the printing presses of the future, then government must assure their availability to all individual citizens. The Petitions illustrate that the video dialtone "gateways" envisioned by the Commission are being set up for high-end programmers to sell their products to high-end buyers and will not in practice be available to the less fortunate sectors of society. Furthermore, the Section 214 public interest standard is so vague and ill-defined that even if a particular applicant adequately shows that it will serve the entire public, there remains the constant danger that other applicants will not.

For this very reason, the Cable Act allows franchising authorities to enforce requirements applicable to all operators for public, educational and governmental ("PEG") channels, equipment and services. Experience shows that such support is required to permit members of the public to make practical use of the channels. But with such support, local and noncommercial entities have been able to participate in the video revolution in ways that would otherwise have been entirely beyond their means.

Communications democracy, then, requires that regulators ensure that carriers provide point-to-point video transmission channels available to individuals and nonprofit groups even if

the unaided market does not. Both channel access and production facilities, including technical advice, must be available for free or at nominal cost. This is the policy decision Congress made concerning cable television systems. That policy should have been carried through to video dialtone at its inception, and it is not too late to do it now. The Petitions illustrate that, without such protections, the Section 214 process does not adequately take into account the needs of all the public.

## 2. Universal Service.

If it is essential for communications democracy that all citizens have the opportunity to transmit video programming, it is equally essential to be able to receive it. The Petitions clearly make the point that some members of society will not receive the benefits of video dialtone under the current regulatory scheme. This cuts against the grain of historic telecommunications policy in this country. Nationwide universal service and equitable access to television services has been a consistent goal of national telecommunications policy, and concern for widespread and equitable availability of television service is prominent in the Cable Act and its legislative history.

Because of that policy, universal television by wire service is now being achieved through local franchise regulation of cable operators. The Coalition noted in its comments in the Video Dialtone Rulemaking that video dialtone operators might not be willing to serve low-density or low-income areas unless required



to do so. This is exactly what is happening now, according to the Petitions, and if the Commission does not act, large segments of the population will not be served by video dialtone. If an operator does not bring a trunk line into a neighborhood, residents of the area will not generally be in a position to run their own lines out to the nearest part of the system. Sound regulatory policy for future television by wire systems must therefore foster the extension of the system to provide widespread service. Imposing such a requirement on video dialtone providers is eminently reasonable, because the provider is making use of public resources, in the form of local public rights-of-way, for private gain.

- B. Video Dialtone Providers Should Be Required to Serve the Same Local Community Interests and Provide the Same Public Benefits Envisioned in the Cable Act.

The Section 214 process ignores the conditions of communications democracy described above for video dialtone systems. Traditional telephone regulation alone does not suffice for the transmission of video programming.

Point-to-point telephone regulations do not deal with the essential features of point-to-multipoint videocasting. To be sure, the public interest in universal service is much the same for both, and hence federal policy strongly supports universal telephone service, just as it encourages widespread development of cable and broadcast television services. Similarly, both telephone and cable television regulation have encouraged access

and use of the networks by noncommercial and physically and economically disadvantaged individuals and organizations.

On the other hand, point to multi-point videocasting presents additional, unique universal service problems. The financial and technical barriers to universal video transmission are far more daunting than the barriers to universal voice and data transmission. This is primarily because video production is much more difficult and expensive, and video transmission involves much larger amounts of data. As a result, the Cable Act model of relying on one local franchise process to assure universal service and access on local community needs, is a far better model for serving the goals of communications democracy for any form of television by wire.

C. Local Regulators Must Be Empowered to Protect Local Community Interests Through Regulation of Television By Wire.

The proper venue for regulations to implement communications democracy is the locality where a system for television by wire is installed and operates. The Cable Act established municipal franchising as the best way to charge a cable operator with the responsibilities concomitant with its use of public property and resources: If the same approach were now being applied to video dialtone providers, the Commission would not now be faced with this issue, because municipal franchising authorities have experience with preventing redlining.

1. Local regulation is appropriate for communications democracy.

Federalism -- the exercise of regulatory and other powers at a level as close to the people as is practical for a given subject matter -- is an integral feature of the American constitutional system. It is most efficient, and permits the most direct and effective exercise of governing powers by the people themselves, if the business of government is handled to the extent possible at the local level. Matters that necessarily require coordinated action on a scale greater than that of the neighborhood or municipality are separated out for treatment by counties or states; only matters that require national uniformity are referred to the federal government.

This broad general principle should guide the Commission in this proceeding. Local governments are better placed than are federal regulators to determine local needs. Even where some level of nationwide uniformity and interconnectivity is important, as with the telephone network, local segments of the system must be installed in ways properly adapted to the local situation. Hence, communities must be able to adjust regulatory requirements with respect to local needs and conditions, such as population density, local demand for specific types of noncommercial video services, geographic constraints, and the state of existing communication networks in the community.

Television by wire also implicates numerous issues with which local governments are necessarily concerned. These include (1) increasing information diversity; (2) providing universal

service to all local residents; (3) ensuring that the entire public has access to the video medium; (4) allowing public participation and input in selecting franchisees, and formulating economically feasible terms for franchisees; (5) ensuring that a franchisee is responsive to the particular needs of the local community; (6) conserving a scarce resource, the local utility infrastructure; (7) planning and coordinating for the efficient use of that infrastructure; (8) minimizing the disruption of public and private property resulting from the installation of a wiring system; (9) minimizing the permanent visual blight caused by utility poles and wires; (10) ensuring that a system for television by wire is constructed and operated in a safe and productive manner; (11) obtaining just compensation for a franchisee's use of public property; (12) protecting the public from fraud and dishonesty by franchisees; and (13) reducing the need for compliance proceedings.

Thus, local franchising is far better suited for resolving the concerns expressed in the Petitions, and many others as well.

Furthermore, it is not practical for the Commission to try to regulate redlining at the federal level. The Commission simply does not have the resources to regulate effectively the activities of 11,000 local cable systems and over 1,000 LEC's. Lacking the intimate familiarity with local conditions that comes naturally to a local franchising authority, the Commission would incur extensive costs in each case in the course of investigating the situation and determining how video dialtone could best serve

local needs and interests. As a result, the Commission would face a dilemma: It would either have to abdicate responsibility for making an adequate analysis of the carriers' public service obligations in each area, or it would have to carry out a multitude of costly individual investigations that would result in much higher costs than would be imposed by any local authority. It is preferable to avoid this dilemma altogether by following the consensus expressed in the Cable Act and leaving the task of detailed regulation to local governments whenever possible.

2. Local franchising will not impede video dialtone.

Since the passage of the Cable Act, the cable industry has grown immensely, both in size and in concentration. This growth is the best evidence that local franchising poses no threat to the future success of television by wire, however it may evolve. Under the Cable Act's franchise requirements, video program providers have been able not only to flourish, but to create a multi-billion-dollar industry, almost from scratch. There is no reason to suppose that franchising requirements have held back development of the cable television industry, or that they would hold back the development of the video dialtone industry.

It is clear that local governments are in the best position to protect the interests of their constituents in negotiating appropriate protections for the community's interests when a video dialtone carrier uses the public ways. By excusing video dialtone operators from obligations similar to the local

franchising requirements of the Cable Act, the Commission has already injured the local needs and interests served by the Cable Act and by local franchising. If video dialtone operators were subject to local franchising requirements today, the Petitions would not have been filed because the needs and interests they ask the Commission to address would already have been met.

#### IV. CONCLUSION

The Petitions raise a serious concern that the Commission must address. As predicted by the Coalition in the Video Dialtone Rulemaking, the lack of an adequately defined and tailored public interest component in the Section 214 certification process will prevent video dialtone from reaching its full potential to serve all Americans. It seems unlikely that the Commission will find it practical to impose the necessary standards in thousands of individual communities across the country. Only local franchising, under the established and tested provisions of the Cable Act, can adequately provide for

meeting the needs and interests of communities all across the country.

Respectfully submitted,

THE ALLIANCE FOR COMMUNICATIONS  
DEMOCRACY; THE ALLIANCE FOR COMMUNITY  
MEDIA; THE CITY OF CHILLICOTHE, OHIO;  
THE CITY OF DETROIT, MICHIGAN; THE CITY  
OF FORT WORTH, TEXAS; KING COUNTY,  
WASHINGTON; THE OFFICE OF THE CITY  
ATTORNEY OF THE CITY OF LOS ANGELES,  
CALIFORNIA; MONTGOMERY COUNTY, MARYLAND;  
THE CITY OF REDONDO BEACH, CALIFORNIA;  
AND THE CITY OF WADSWORTH, OHIO  
(COLLECTIVELY, THE "LOCAL COMMUNITY  
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By



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